

(A)  
No. 97-1252

FILED

APR 30 1998

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, ATTORNEY GENERAL, *et al.*,

*Petitioners,*

—v.—

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF *CERTIORARI* TO  
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**RESPONDENTS' BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

Petitioners have publicly admitted that they targeted respondents for deportation because of their political associations, that none of the respondents have engaged in any criminal activity, and that there would have been no basis for arresting respondents had they been United States citizens. In addition, petitioners have not challenged the district court's factual findings that the government selectively targeted respondents for their political associations despite having no evidence that respondents specifically intended to further any unlawful acts. Based on these findings, the district court preliminarily enjoined the Immigration and Naturalization Service from pursuing respondents' deportation pending final resolution of their First Amendment selective enforcement claims. The questions presented are:

1. Whether the district court had jurisdiction over respondents' selective enforcement claims, where to deny jurisdiction would deprive respondents of any judicial forum to redress immediate irreparable injury to their First Amendment rights, and where factual development necessary to prove their First Amendment claims is unavailable in the administrative immigration process or appellate court review thereof.

2. Whether the district court acted within its discretion in issuing a preliminary injunction, based on unchallenged factual findings that: (1) the group with which respondents are allegedly associated engages in a wide range of lawful activities; (2) petitioners targeted respondents for deportation based on their political associations without evidence that respondents specifically intended to further any unlawful ends of the group; and (3) petitioners did not seek to deport other similarly situated individuals.

## RULE 29.6 STATEMENT

This brief is filed on behalf of eight individuals -- Aiad Barakat, Naim Sharif, Khader Musa Hamide, Nuangugi Julie Mungai, Ayman Mustafa Obeid, Amjad Obeid, Michel Ibrahim Shehadeh, and Basher Amer -- and the American-Arab Anti-Discrimination Committee (ADC). The ADC does not have any parent or subsidiary companies.

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## STATEMENT OF THE CASE

### A. Statement of the Facts

The government seeks review of a preliminary injunction barring the Immigration and Naturalization Service (INS) from pursuing plaintiffs' deportations until their First Amendment selective enforcement claims are resolved. The district court issued the injunction based on findings -- unchallenged on appeal -- that: (1) the group with which plaintiffs are accused of being associated, the Popular Front for the Liberation of Palestine (PFLP), engages in a wide range of lawful activities; (2) defendants singled plaintiffs out for associating with the PFLP without any evidence that plaintiffs specifically intended to further any unlawful ends; and (3) defendants did not seek to deport other similarly situated individuals.

#### 1. The PFLP's Lawful Activities

The district court found, and the government has never disputed, that the PFLP, a constituent group within the Palestine Liberation Organization, engages in a wide range of lawful activities, including the provision of "education, day care, health care, and social security, as well as cultural activities, publications, and political organizing." Pet. App. 48a. It operates day care centers, hospitals, health clinics, schools, and youth clubs; awards scholarships for higher education; provides health insurance to its members and their families; sponsors art, music, and other cultural activities; publishes political magazines and newspapers; and maintains diplomatic offices in many countries throughout the world. C.A. SER 136-44.<sup>1</sup> The government's own evidence showed that the PFLP engages in widespread

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<sup>1</sup> Citations to the Supplemental Excerpts of Record in the court of appeals will be designated "C.A. SER."

lawful political and cultural activities in the United States. Pet. App. 48a.

## 2. Improper Motive

The district court found, and defendants did not challenge on appeal, that defendants targeted plaintiffs for their political associations, and that "there is no evidence in the record that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims." Pet. App. 75a n.14. These findings are fully supported by the record:

1. The deportation cases began in January 1987, when the INS arrested all eight individual plaintiffs and charged them with being associated with a group that advocates the doctrines of world communism, a First Amendment-protected activity. Pet. App. 3a, 80a-82a.

2. Then-FBI Director William Webster testified in Congress two months after plaintiffs' arrests that "all of them were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation . . . [I]f these individuals had been United States citizens, there would not have been a basis for their arrest."<sup>2</sup>

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<sup>2</sup> Pet. App. 4a. Had plaintiffs been supporting *illegal* conduct of the PFLP, they would have been subject to arrest (even as United States citizens) under the conspiracy or aiding and abetting statutes, 18 U.S.C. §§2, 371, and numerous statutes reaching terrorist acts abroad. See, e.g., 18 U.S.C. §32 (destruction of aircraft in foreign air commerce); §33 (destruction of motor-vehicle in foreign commerce); §956 (conspiracy to injure foreign property); §1116 (attacking internationally protected persons); §1201 (kidnapping of person in foreign commerce); §1203 (taking of hostages); §1361 (damage to American property); §2332 (killing Americans abroad). Support of illegal activities would also have warranted deportation under several provisions of the Immigration and

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3. INS District Director Ernest Gustafson, who authorized the deportation proceedings against plaintiffs, admitted that all eight "were singled out for deportation because of their alleged political affiliations with the [PFLP]." C.A. SER 306. He stated that the INS sought plaintiffs' deportation "at the behest of the FBI, which concluded after investigating plaintiffs that it had no basis for prosecuting plaintiffs criminally, and urged the INS to seek their deportation." *Id.* at 307.

4. When the INS dropped the initial political association charges against six of the eight plaintiffs, electing to proceed against them only for technical visa violations, INS Regional Counsel William Odencrantz announced that the change was merely tactical, and that the INS continued to seek deportation of all eight plaintiffs because "[i]t is our belief that they are members of [the PFLP]." C.A. SER 95-96; Pet. App. 82a.<sup>3</sup>

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<sup>2</sup> (...continued)

Nationality Act (INA), none of which has ever been invoked here. See, e.g., 8 U.S.C. §§1227(a)(2)(A) (crimes of moral turpitude); (a)(2)(D) (conspiring to commit sabotage or sedition); (a)(4)(A) (any criminal activity that endangers public safety or national security).

<sup>3</sup> On the eve of the first preliminary injunction hearing in this case, the INS dropped its political association charges against the six non-permanent-resident aliens -- Aiad Barakat, Naim Sharif, Julie Mungai, Ayman Obeid, Amjad Obeid, and Basher Amer -- and instead charged them with violating their visas, either by overstaying, by working without authorization, or by taking too few credits while on a student visa. It maintained political association charges against permanent residents Khader Hamide and Michel Shehadeh, but substituted a charge that they were associated with a group that advocates the destruction of property. The INS has since granted Barakat and Sharif legalization, and accordingly concedes they are no longer subject to deportation "based on the original visa violations." Pet. 7 n.4. The other four non-permanent-resident plaintiffs would be eligible for permanent resident status but for their alleged association with the PFLP.

5. Contemporaneous memoranda prepared by the FBI for the purpose of urging the INS to seek plaintiffs' deportation confirm that plaintiffs were singled out for lawful acts of political association. The documents, which include a 1300-page FBI report and memos on each of the plaintiffs, consist entirely of accounts of lawful and non-violent political activity. Over 300 pages of the FBI report, for example, are devoted to tracking plaintiffs' distribution of PFLP literature available in public libraries throughout the United States. The documents include detailed reports of political demonstrations, meetings, and dinners, and extensive quotations from political speeches, placards, and leaflets. They repeatedly criticize plaintiffs' political views as "anti-US, anti-Israel, anti-Jordan," C.A. SER 353, 369-70, 371, 372, 376, 377, 389, 392, and even "anti-REAGAN and anti-MABARAK [sic]." C.A. SER 364. The FBI report states that its purpose is "to identify key PFLP people in Southern California so that law enforcement agencies capable of *disrupting the PFLP's activities* through legal action can do so." C.A. SER 354 (emphasis added). It specifically urges plaintiff Hamide's deportation, not because he did anything criminal, but because he is "intelligent, aggressive, dedicated, and shows great leadership ability." C.A. SER 348.

6. While the government's petition misleadingly and repeatedly implies that plaintiffs' fundraising activities were the basis for the decision to deport, Pet. 3, 8, 12, 21, 22-30, the district court found that defendants in fact based their decision on a wide range of other speech and associational activities. The district court found and the government conceded that it targeted plaintiffs for their membership in the PFLP (Pet. App. 4a, 75a n.14, C.A. SER 306), distributing PFLP literature and recruiting new members (Pet. App. 132a), communicating with PFLP leaders in the United States, and attending PFLP meetings, in addition to humanitarian fundraising. (Pet. App. 60a-61a).

### 3. Disparate Impact

The district court and the court of appeals also found that the INS has not sought to deport numerous similarly situated aliens -- both permanent residents and aliens with technical visa violations -- who were members and supporters of the Nicaraguan Contras, Afghanistan Mujahedin, Mozambique RENAMO, several anti-Castro Cuban groups, and the Vietnamese Montagnards, organizations which engaged in similar INA-proscribed activities and advocacy. Pet. App. 18a-19a, 106a-07a, 138a-50a, 50a-51a n.3, 74a; C.A. SER 97-265, 286-90, 309-31. In fact, the INS has not sought to deport *any* aliens other than plaintiffs Hamide and Shehadeh solely for associational activities with *any* other group since this case began more than 11 years ago. C.A. SER 226. And an INS official testified that he could not remember *any* other instance in which the Los Angeles INS office sought to deport someone for taking too few academic credits on a student visa, the only charge against Bashar Amer, even though the INS received reports of many such violations. Pet. App. 88a. The district court's factual findings of disparate treatment were not challenged by the government on appeal.<sup>4</sup>

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<sup>4</sup> In light of defendants' failure to challenge the district court's findings, the Court should not be misled by defendants' Statement, which makes assertions that have no support in or are directly contradicted by lower court findings. For example, defendants begin their petition with a litany of charges regarding the PFLP's terrorist acts. Pet. 2. But no factual findings support any of these assertions. And more importantly, the district court found (and defendants do not dispute) that plaintiffs were not "in any way implicated" in any unlawful PFLP activities. Pet. App. 48a. In short, defendants' opening, like their theory of the case, is predicated on nothing more than guilt by association.

Similarly, defendants assert that an FBI agent observing a fundraising event concluded that money was apparently being raised for the PFLP's

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## B. The Decisions Below

On the basis of the evidence summarized above, the district court preliminarily enjoined the deportation proceedings against plaintiffs on selective enforcement grounds, and the court of appeals unanimously affirmed. The injunctions were issued and reviewed in two stages. In January 1994, the district court granted a preliminary injunction to six of the eight plaintiffs. Pet. App. 138a. It declined to extend the injunction to plaintiffs Hamide and Shehadeh at that time because it erroneously believed that it lacked jurisdiction over their claims. Pet. App. 129a.

Defendants appealed from the first injunction, and plaintiffs Hamide and Shehadeh cross-appealed from the district court's jurisdictional decision. On November 8, 1995, the court of appeals unanimously affirmed the initial

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<sup>4</sup> (...continued)

terrorist activities. Pet. 3 n.2. But the district court found that the evidence concerning this event -- a widely advertised family style dinner open to the public and attended by more than 1,000 persons -- did not reasonably support an inference that any fundraising was for terrorist activities, and defendants did not challenge that finding. Pet. App. 61a, 63a, 75a n. 14. In fact, all evidence showed that the funds were donated to the United States Organization for Medical and Educational Needs (U.S. OMEN), an IRS-certified tax-exempt humanitarian aid organization. Pet. App. 63a. Defendants refer to a statement by one speaker at the event, Jaber El-Wanni, which an FBI agent now characterizes as a threat on the life of an individual in the West Bank. Pet. 3 n.2. The FBI did not even mention any such "threat" in its contemporaneous memos on the event, or in its memos to the INS to support plaintiffs' deportations. Nor did the FBI ever take any action against Mr. El-Wanni himself. And as the district court found, "[t]here is no evidence that plaintiffs directed Mr. El-Wanni to make that statement, conspired with him, nor even that they were aware that he would make it. The only theory left for holding plaintiffs responsible for Mr. El-Wanni's statement is guilt by association, a theory forbidden by the First Amendment." Pet. App. 69a.

preliminary injunction. It first ruled that the district court had jurisdiction over plaintiffs' selective enforcement claims for two reasons: (1) plaintiffs' claims required factual development beyond the scope of the administrative deportation proceedings, and therefore could only be addressed in an original district court proceeding; and (2) plaintiffs were suffering irreparable injury to their First Amendment rights, and therefore to delay review would be to deny plaintiffs any forum for redress of immediate and ongoing constitutional injury. Pet. App. 85a-95a. Because the court of appeals found that the same reasoning was applicable to Hamide and Shehadeh's claims, it reversed the district court's dismissal of their claims. Pet. App. 95a-97a.

On the merits, the court of appeals held that plaintiffs are entitled to First Amendment protection as persons living in the United States, and that the government could not target them based on PFLP associational activity unless it showed that their association was "knowing" and with "specific intent to further [the PFLP's] illegal aims." Pet. App. 108a (quoting *Healy v. James*, 408 U.S. 169, 186 (1972)). The government sought no further review of this decision, which carefully considered and rejected each of the government's arguments that aliens should be accorded diminished First Amendment protection. Pet. App. 109a-116a.

On remand to the district court, the government submitted over 10,000 pages of evidence, and moved to vacate the existing preliminary injunction. Plaintiffs Hamide and Shehadeh moved to extend the injunction to their cases. The district court found that the government had cited no "changed circumstances" that would justify vacating the existing preliminary injunction, since all the evidence it submitted with its motion to vacate could have been submitted when the injunction was first adjudicated. Pet. App. 55a n.6. The district court nonetheless examined

all of the new evidence, and found that "there is no evidence in the record that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims." Pet. App. 75a n.14. Accordingly, the court denied the motion to vacate the existing injunction, and granted Hamide and Shehadeh's motion to extend the injunction to them.

Defendants appealed a second time. Having failed in their contention that aliens do not deserve the same First Amendment rights as citizens, defendants now maintained that neither citizens nor aliens have a First Amendment right to provide material support to a "foreign terrorist organization," even if the support is provided and used solely for lawful activities. In making this claim, defendants again did not challenge any of the district court's factual findings.

While this second appeal was pending, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L.No. 104-208, Div. C, 110 Stat. 3009. The government argued, in a new motion to vacate the injunction in the district court and in a supplemental brief to the court of appeals, that one subsection of the act, now codified at 8 U.S.C. §1252(g), divested the courts of jurisdiction to adjudicate plaintiffs' First Amendment claims. Both the district court and the court of appeals rejected that view, because it would have deprived plaintiffs of *any* federal forum to litigate substantial First Amendment claims. Both courts rejected defendants' suggestion that plaintiffs could raise their claims some years down the road on appellate review of a deportation order. Appellate review is limited by statute to the administrative record, a record that defendants conceded cannot develop the facts necessary to prove plaintiffs' First Amendment claims. And even if appellate review were available, it would come too late in the day to redress

immediate irreparable injury to plaintiffs' First Amendment rights. Accordingly, both courts construed IIRIRA to preserve district court jurisdiction for constitutional challenges, such as plaintiffs', which cannot adequately be addressed on appellate review of a final deportation order. Pet. App. 22a-43a; 6a-15a.

On the merits, the court of appeals agreed with the district court that defendants had failed to cite any "changed circumstances" that would justify vacating the initial preliminary injunction. Pet. App. 17a. In addition, the court affirmed the extension of the injunction to Hamide and Shehadeh, based on the unchallenged findings that defendants did not have a reasonable ground for believing that plaintiffs specifically intended to further any unlawful acts of the PFLP. Pet. App. 18a-21a. The court rejected defendants' argument regarding fundraising for "foreign terrorist organizations" on two grounds. First, because defendants concededly targeted plaintiffs for many speech and associational activities beyond fundraising, defendants' fundraising argument, even if accepted, would not warrant denial of the injunction. And second, the right to associate with a political group has always included the right to provide financial support, so long as that support is not given with specific intent to further illegal ends. Pet. App. 20a-21a.

The government suggested rehearing *en banc*, and the court of appeals denied the suggestion. Three judges dissented. Pet. App. 246a.

## REASONS FOR DENYING THE WRIT

This Court should deny review for several reasons. No other court of appeals has addressed either of the two issues presented here, and thus there is no conflict among the circuits. The jurisdictional issue is governed by temporary

"transitional" rules, making it highly unlikely that the issue will often, if ever, recur. The question presented on the merits is premature, as the government seeks interlocutory review of a preliminary injunction when final judgment is likely to follow shortly on a complete record. And the merits question as to which the government seeks review -- whether the First Amendment protects material support for the lawful activities of a "foreign terrorist organizations" -- is not properly presented, because the government does not challenge the district court's findings that plaintiffs were targeted for a wide range of speech and associational activities other than material support.

1. The jurisdictional issue presented here is *sui generis*. This case spans two separate jurisdictional statutes, and is governed by "transitional" rules that will soon be obsolete. The court of appeals ruled that under these "transitional" rules, district courts have jurisdiction to adjudicate constitutional claims for which there is no other adequate means of review. No other court of appeals has addressed this issue under the transitional rules, and thus the government seeks *certiorari* in the absence of a circuit conflict, and in a case unlikely to have broad impact. The only appellate decision the government even contends is in conflict with the court of appeals' decision -- *Massieu v. Reno*, 91 F.3d 416 (3d Cir. 1996) -- did not address the issue presented here, because it both predated the transitional rules and concerned a facial constitutional challenge for which appellate review was fully adequate. Moreover, the court of appeals' result is consistent with decisions of this Court and other courts of appeals construing the prior immigration statute, with the rule that First Amendment claims require prompt judicial resolution, and with the maxim that jurisdictional statutes must be interpreted to preserve review of constitutional claims.

2. On the merits, defendants seek premature review of a question not properly presented. They ask the Court to grant review from an interlocutory appeal to rule that the First Amendment imposes no bar on selective targeting of citizens or aliens for supporting the lawful activities of foreign political organizations deemed "terrorist." However, defendants conceded below and do not challenge here the district court's findings that plaintiffs were targeted for a wide range of protected speech and associational activity other than fundraising. Thus, even if the abstract legal proposition defendants advance were correct, the preliminary injunction would stand. The government has shown no extraordinary circumstances warranting this Court to depart from its normal course of denying review before final judgment.

**I. THE COURT OF APPEALS' JURISDICTIONAL HOLDING IS *SUI GENERIS*, ADDRESSES A "TRANSITIONAL" STATUTORY SCHEME UNLIKELY TO AFFECT OTHER CASES, AND IS ENTIRELY CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL**

Applying the established rule that jurisdictional statutes should not be construed to bar judicial review of constitutional claims, the court of appeals held that the district court had jurisdiction to hear plaintiffs' First Amendment selective-enforcement claims because no other forum could meaningfully address those claims. The district court is the *only* place plaintiffs can vindicate their constitutional claims for two reasons: (1) plaintiffs' selective enforcement claims cannot be addressed in the generally exclusive review process for deportation cases, because the immigration judge and Board of Immigration Appeals cannot develop the facts necessary to adjudicate

those claims, and the court of appeals' review is expressly limited to the administrative record, Pet. App. 12a-14a; 87a-92a; and (2) plaintiffs are suffering ongoing irreparable injury to their First Amendment rights, so that delay in resolution of their claims is equivalent to denying review of those constitutional claims. Pet. App. 14a-15a, 92a-94a.

As a threshold matter, the jurisdictional question presented is inappropriate for *certiorari* because it is *sui generis*. Plaintiffs' case spans two different statutory jurisdictional schemes, 8 U.S.C. §1105a (1995) and 8 U.S.C. §1252 (1996), and is governed by temporary "transitional" rules that apply only to a small subset of immigration cases. In enacting IIRIRA, Congress rewrote the judicial review statute for immigration cases, but specifically provided that the amendments made by IIRIRA "shall not apply" to deportation proceedings instituted before April 1, 1997. IIRIRA, §309(c)(1)(A), 8 U.S.C. §1101 note. Instead, "[those] proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments," subject only to a set of transitional rules. IIRIRA, §309(c)(1)(B), 8 U.S.C. §1101 note. Defendants contend that a single provision of IIRIRA, 8 U.S.C. §1252(g), nonetheless applies independently to pending cases, but do not argue that the rest of IIRIRA applies. Plaintiffs dispute that point, in large part because, as the court of appeals found, §1252(g) makes no sense standing alone: literally construed, it would render virtually all immigration decisions in cases instituted prior to April 1, 1997 immune from any judicial review. Pet. App. 8a-9a.<sup>5</sup>

<sup>5</sup> Plaintiffs maintain that §1252(g) should apply to pending cases only where the Attorney General takes action, also specified by the traditional rules, to trigger the entire new judicial review scheme for a pending case. IIRIRA, §§309(c)(2), (c)(3), 8 U.S.C. §1101 note. The Attorney General has taken no such action here. While the court of appeals

(continued...)

But even if defendants' view were accepted, plaintiffs' case is governed by a unique transitional hybrid of old and new statutes that will affect few if any other cases. In light of the *sui generis* nature of this case, it should come as no surprise that not only is there no conflict among the circuits, but no other court has even addressed the jurisdictional issue presented here.

Under both the pre- and post-IIRIRA statutory schemes, the court of appeals correctly found that the district court had jurisdiction to hear claims of irreparable First Amendment injury that could not adequately be addressed in any other forum. In so construing 8 U.S.C. §1105a before IIRIRA was enacted, the court of appeals simply followed *Cheng Fan Kwok v. INS*, 392 U.S. 206, 209-10 (1968), which held that district court jurisdiction was proper for claims that cannot adequately be addressed through the generally exclusive appellate review process. Every other circuit to address the matter has concurred.<sup>6</sup>

The same principles guided the lower courts' interpretation of jurisdiction after enactment of IIRIRA.

<sup>5</sup> (...continued)

rejected this view, it provides an independent ground for affirmance, and another reason why this case is inappropriate for *certiorari*.

<sup>6</sup> See, e.g., *INS v. Stanisic*, 395 U.S. 62, 68 n.6 (1968) (district court has jurisdiction to review actions of District Director beyond the scope of the deportation hearing); *Olaniyan v. District Director, INS*, 796 F.2d 373, 376-77 (10th Cir. 1986) ("If the issues do not meet the jurisdictional tests of [§1105a], we have no authority to review them under the auspices of that section, and exclusive jurisdiction for initial review lies in district court"); *Abedi-Tajrishi v. INS*, 752 F.2d 441, 443 (9th Cir. 1985) (same); *Fatehi v. INS*, 729 F.2d 1086, 1088 (6th Cir. 1983); *Dastmalchi v. INS*, 660 F.2d 880, 891 (3d Cir. 1981); *Ghorbani v. INS*, 686 F.2d 784, 791 (9th Cir. 1982) (same); *Lennon v. INS*, 527 F.2d 187, 195 (2d Cir. 1975) (district court has jurisdiction over selective enforcement claim).

Like 8 U.S.C. §1105a, the new IIRIRA judicial review scheme generally limits judicial review of deportation orders to a petition for review in the court of appeals, but preserves district court review for claims that cannot adequately be addressed through the otherwise exclusive review scheme. 8 U.S.C. §1252(g), the provision upon which defendants rely, states that "*except as provided in this section . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings . . . against any alien under this Act.*" 8 U.S.C. §1252(g) (emphasis added). The opening clause italicized above expressly contemplates exceptions to its jurisdictional bar. Section 1252(f) is one such exception, and the court of appeals held that if §1252(g) applies here, so must §1252(f). Section 1252(f) in turn bars injunctive relief against the deportation provisions, "other than with respect to the application of such provisions to an individual alien against whom proceedings . . . have been initiated." 8 U.S.C. §1252(f). As the court of appeals found, this language authorizes injunctive actions in district court by individuals against whom deportation proceedings have been initiated, such as plaintiffs. Defendants offer no alternative explanation of the statutory language.

The court of appeals' result accords with the general goal of streamlining deportation appeals. An alien against whom proceedings have been initiated will ordinarily have no right to district court injunctive relief, because to the extent his legal claims can be addressed in the immigration process and appellate review thereof, he will have an adequate remedy at law. For the vast majority of cases, therefore, the immigration process and appellate review will be exclusive. But where an alien advances a claim that cannot be adjudicated in the immigration process or heard

on appellate review, injunctive relief is appropriate, and is authorized by 8 U.S.C. §1252(f).<sup>7</sup>

Preservation of district court jurisdiction for First Amendment claims that cannot otherwise be heard, such as plaintiffs' claims here, is also required by two other lines of Supreme Court precedent. Absent "clear and convincing evidence" that Congress intended otherwise, jurisdictional statutes must be construed to preserve review of constitutional claims.<sup>8</sup> Allegations of irreparable First Amendment injury in particular require prompt judicial review.<sup>9</sup> The only judicial review defendants suggest might

<sup>7</sup> Where an otherwise exclusive jurisdictional provision does not apply, plaintiffs are entitled to fall back on general federal question jurisdiction, 28 U.S.C. §1331, and on 8 U.S.C. §1329 (1995), providing district court jurisdiction for actions arising under the INA. The government is likely to maintain that §1252(g) bars such reliance, but by its terms, that provision imposes no bar for the exceptions "provided in this section." Subsection (f) provides an exception to subsection (g), and permits injunctive actions, which may therefore go forward under either §1331 or §1329. IIRIRA amended 8 U.S.C. §1329 to limit it to actions filed by the government (rather than against the government), but that limitation applies only to cases filed after September 30, 1996. IIRIRA, §381, 8 U.S.C. §1329 note.

<sup>8</sup> See, e.g., *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974). *Czerkies v. U.S. Dep't of Labor*, 73 F.3d 1435, 1439 (7th Cir. 1996)(*en banc*)(Posner, J.)("The circuits are in agreement: door closing statutes do not, unless Congress expressly provides, close the door to constitutional claims"). The district court applied this rule to 8 U.S.C. §1252(g), and interpreted it not to apply to constitutional claims that could not otherwise be heard because it does not specify that it applies to such claims, and there is no "clear and convincing evidence" that Congress sought to foreclose review of such claims. Pet. App. 32a-36a; *Johnson v. Robinson*, 415 U.S. at 373-74.

<sup>9</sup> See, e.g., *Younger v. Harris*, 401 U.S. 37, 48 (1971); *Freedman v.* (continued...)

be available is barred by the inability to develop the necessary facts, and in any event would come only after many years of administrative proceedings, during which time plaintiffs' ongoing First Amendment injuries would be unredressable.<sup>10</sup>

Defendants have conceded that plaintiffs cannot develop the facts for their selective enforcement claims in the immigration process. Pet. App. 12a, 40a, 87a. Such claims, therefore, cannot be adjudicated on appellate review, which is expressly limited to the administrative record.<sup>11</sup> The government nonetheless argues that a court of appeals on appellate review could remand plaintiffs' selective enforcement claims to a district court for factual

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<sup>9</sup> (...continued)

*Maryland*, 380 U.S. 51, 58 (1965). Because plaintiffs do not rely on "the expense and annoyance of litigation," but on the palpable chill on their First Amendment rights, defendants' reliance on *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), and *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982)(*per curiam*), Pet. 15 n.6, 19, is misplaced. Neither case involved a claim of irreparable injury to First Amendment rights. This Court has recognized the difference. *Younger v. Harris*, 401 U.S. at 48 (even though federalism generally bars federal court intervention into state criminal proceedings, such intervention justified where state prosecution invoked in retaliation for exercise of First Amendment rights).

<sup>10</sup> Before their cases were enjoined in 1996, Hamide and Shehadeh's deportation proceeding before an immigration judge had already lasted several years, and was not even 25% completed. Administrative appeals to the Board of Immigration Appeals frequently take many years to be resolved.

<sup>11</sup> This is true for cases governed both by IIRIRA and by the prior jurisdictional statute. 8 U.S.C. §1252(b)(4)(A) provides: "the court of appeals shall decide the petition only on the administrative record on which the order of removal is based." 8 U.S.C. §1105a(4) (1995) provided: "the petition shall be determined solely upon the administrative record upon which the deportation order is based."

development under the Hobbs Act, 28 U.S.C. §2347(b). Pet. 18. The court of appeals twice properly rejected this argument. Pet. App. 13a-14a; 90a-91a. As every court to address the issue has found, and as the INS has repeatedly argued elsewhere, a remand to district court to develop facts would contravene the express statutory directive that appellate review be limited to the administrative record.<sup>12</sup> The government has never explained its aberrant position here, nor has it explained how an appeal that must be decided "solely upon the administrative record" could be based on evidence developed outside the administrative record.<sup>13</sup>

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<sup>12</sup> *Ghorbani v. INS*, 686 F.2d at 787 n.4 (accepting INS's argument that statutory provision limiting appellate review to the administrative record "precludes application of the procedures of the Hobbs Act that permit transfer of a case to a district court for a hearing"); *Osaghae v. INS*, 942 F.2d 1160, 1162 (7th Cir. 1991)(statutory provision limiting appellate review to the administrative record means that "we are not to take evidence and base our decision on some mixture of that evidence and the evidence that was before the Board"); *Makonnen v. INS*, 44 F.3d 1378, 1385 (8th Cir. 1995)(same); *Coriolan v. INS*, 559 F.2d 993, 1003 (5th Cir. 1977)(same).

<sup>13</sup> The government argues that authority for a remand to the district court under 28 U.S.C. §2347(b) can be implied from the fact that the IIRIRA judicial review scheme specifically prohibits a court of appeals from remanding to the agency for factual development pursuant to 28 U.S.C. §2347(c). Pet. 18. As the court of appeals found, this argument fails. Pet. App. 13a-14a. IIRIRA's statutory bar on remanding to the agency pursuant to §2347(c) was necessary because under the prior review scheme, several courts had held that such remands were permissible, over the INS's objections. See, e.g., *Makonnen*, 44 F.3d at 1385; *Osaghae*, 942 F.2d at 1162; *Becerra-Jimenez v. INS*, 829 F.2d 996, 1001 (10th Cir. 1987)("We adopt the position of the Sixth, Fifth, and Third Circuits and hold that §2347(c) is available to this court to require the INS, upon remand, to reopen deportation proceedings."); *Dolores v. INS*, 772 F.2d 223, 226 (6th Cir. 1985); *Martinez de Mendoza v. INS*, 567 F.2d 1222, 1226 (3d Cir. 1977); *Coriolan*, 559 (continued...)

The court of appeals' decision is not in conflict with any decision of this Court or any court of appeals. The *only* purported conflict the government identifies is with *Massieu v. Reno*, 91 F.3d 416, a case that predated IIRIRA. Pet. 14. There is no conflict, however, because *Massieu* addressed only the *facial* constitutionality of a particular deportation provision, a claim that could be adequately addressed on appellate review of a final deportation order because it needed no factual development. The Third Circuit repeatedly stated that the result would have been different if, as is the case here, meaningful review were not possible on appellate review. 91 F.3d at 422-24.<sup>13</sup>

Defendants correctly note that two other courts have dismissed cases on the basis of 8 U.S.C. §1252(g): *Ramallo v. Reno*, 114 F.3d 1210 (D.C.Cir. 1997), *petition for cert. filed* (No. 97-526), and *Auguste v. Attorney General*, 118 F.3d 723 (11th Cir. 1997). Significantly, however, defendants do not contend that these cases conflict with the court of appeals' decision. Neither case involved ongoing irreparable constitutional injury requiring immediate judicial review, and in both cases the courts of appeals found that alternative avenues of review were available and adequate to address plaintiffs' claims. *Auguste* could have filed a petition for review, but did not. 118 F.3d at 725. *Ramallo*

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<sup>13</sup> (...continued)

F.2d at 1004. By contrast, every court to address the issue of remand to the district court had accepted the INS's argument that the restriction of appellate review to the administrative record precluded such remands. Pet. App. 91a; *see supra* note 12. Accordingly, Congress and the INS had no need to add language to bar remands to district court, because they were already barred by the "administrative record" provision.

<sup>14</sup> The government notes that the alien in *Massieu* also advanced a selective enforcement claim, Pet. 15, but neither the court of appeals nor the district court in *Massieu* even addressed that claim; both decisions in that case exclusively discussed *Massieu*'s facial constitutional challenge.

could adjudicate her claims on a petition for habeas corpus. 114 F.3d at 1214. Here, an original action in district court is the *only* forum available to address plaintiffs' constitutional claims.

Thus, the lower courts' interpretation of IIRIRA to preserve review of plaintiffs' constitutional claims is consistent with the language of the statute, established jurisprudence regarding judicial review of immigration actions, the constitutional requirement of prompt review of First Amendment claims, and the mandate that jurisdictional statutes be read to preserve judicial review of constitutional claims.

## II. THE UNCHALLENGED FACTS OF THIS CASE DO NOT PRESENT THE CONSTITUTIONAL QUESTION REGARDING FUNDRAISING THAT DEFENDANTS RAISE IN THEIR PETITION FOR *CERTIORARI*

The merits question raised in the government's petition is not properly presented. The government portrays the case as if it turns on whether there is a First Amendment right to provide material support for the lawful activities of foreign terrorist organizations. But as the court of appeals held, resolution of that question will not affect the underlying injunction, because the facts as found by the district court and admitted by defendants establish that defendants targeted plaintiffs for many First Amendment-protected activities other than fundraising, including membership, communication with other members, literature distribution, and attending meetings. Pet. App. 21a; 75a n.14.

In light of these concessions and findings, plaintiffs would be entitled to preliminary injunctive relief even assuming *arguendo* that fundraising for lawful activities were not constitutionally protected, *but see* Point III, *infra*,

because defendants have not met the heavy burden of showing that they would have targeted plaintiffs for their fundraising even in the absence of all the other First Amendment-protected activities for which plaintiffs were targeted. *Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-87 (1977). Of some 10,000 pages that defendants submitted in the district court, fewer than 50 pages concern plaintiffs' fundraising, while the vast majority report on speech and associational activities that defendants do not dispute are protected by the First Amendment. The evidence shows that defendants spent far more time and effort monitoring and reporting on plaintiffs' distribution of literature, political speeches, and demonstrations than they did attempting to determine the purposes of plaintiffs' fundraising, which in any event was directed to a domestic non-profit humanitarian aid organization, the United States Organization for Medical and Educational Needs. Pet. App. 63a.<sup>15</sup>

The government suggests that the court of appeals' decision might have negative implications for the

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<sup>15</sup> Defendants disingenuously suggest that the district court required the government to "follow the trail of money." Pet. 8-9. The court imposed no such requirement; it required only that defendants show that plaintiffs had "specific intent" to further the PFLP's unlawful acts, which does not require trailing the money. It is nonetheless revealing that defendants made no attempt to determine where the money raised actually went, in the face of clear evidence in their own documents that it went to a domestic tax-exempt humanitarian organization.

*Amici* suggest that if this is a mixed motive case, defendants should have had an opportunity to meet their burden under *Mt. Healthy*. *Amici Br. of Washington Legal Foundation, et al.*, at 13. But defendants had two opportunities to do so, as the district court held two hearings on the preliminary injunctions. Defendants chose not to try to meet the *Mt. Healthy* test, preferring to argue that their actions violated no constitutional rights whatsoever. They have already had two bites at the apple. They have no right to a third.

constitutionality of 18 U.S.C. §2339B, a 1996 statute criminalizing material support to foreign organizations designated "terrorist" by the Secretary of State. Pet. 23-25. But that statute, which only criminalizes support *after* an organization has been designated, has no applicability to the conduct at issue here, which took place more than a decade before §2339B became law. Indeed, the government has not yet prosecuted anyone under that statute. In effect, defendants ask the Court to take this case, on a factual record that does not even properly present the issue of material support, in order to render an advisory opinion on a statute not at issue.

The fact that only a preliminary injunction is involved argues further against granting *certiorari* now. The Court's normal practice is to deny review absent extraordinary circumstances. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993)(Scalia, J., concurring); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)(lack of finality may "of itself alone" furnish "sufficient ground for the denial of the application"; *American Construction Co. v. Jacksonville, T & K.W.R. Co.*, 148 U.S. 372, 384 (1893)(Court should not grant *certiorari* from interlocutory appeal "unless it is necessary to prevent extraordinary inconvenience and embarrassment"). No extraordinary circumstances have been shown here -- at issue is simply whether deportation actions against six individuals should be temporarily stayed pending resolution of substantial claims that they were targeted for exercising their First Amendment rights. The preliminary injunction affects no other aliens, and has no general consequences for any federal program.

Once discovery is complete, plaintiffs will seek a permanent injunction on a full record. Discovery has been delayed principally because of defendants' opposition to disclosure, opposition that has led to harsh criticism and

even sanctions from the district court. *See, e.g.*, Pet. App. 51a-56a (finding defendants' withholding of documents "extremely troubling"); Order Granting Plaintiffs' Motion To Amend Discovery Plan, To Compel Production Of Documents, And For Sanctions (Aug. 24, 1996)(assessing sanctions for withholding of documents). And the government has not identified any particular harms arising from the fact that the injunction permits plaintiffs to live here peaceably until their First Amendment claims are finally resolved. Where a final decision on a complete record is certain to follow, and no harm will come from delay, a grant of *certiorari* would be improvident.

### III. THE COURT OF APPEALS' DECISION REQUIRING A SHOWING OF SPECIFIC INTENT TO FURTHER ILLEGAL ACTIVITIES CONFLICTS WITH NO OTHER COURT OF APPEALS, AND IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS

Even if it were properly presented on this record, the issue of whether material support to a "foreign terrorist organization" is constitutionally protected would not warrant *certiorari* review. As with the jurisdictional issue, no other court of appeals has even addressed this issue, and thus there is no conflict among the circuits. And the court's decision fully accords with established First Amendment precedent.

First, this Court has repeatedly recognized that soliciting and donating funds is a form of constitutionally protected political association.<sup>16</sup> Millions of American citizens and

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<sup>16</sup> *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295-96 (1981)(monetary contributions to a group are a form of "collective (continued...)

immigrants "associate" with the NRA, the ACLU, the Boy Scouts, or labor unions by paying dues, donating funds, or raising money.

Second, the Court has long held that association with a political group cannot be penalized absent a showing of specific intent to further the group's illegal ends.<sup>17</sup> Any other standard is guilt by association. Defendants' argument that money is fungible and difficult to trace, Pet. 25 and n.12, would apply equally to donations made to Operation

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<sup>16</sup> (...continued)

expression" protected by the right of association); *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984)(First Amendment protects Jaycees' "fundraising"); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632-33 (1980)(First Amendment protects non-profit group's solicitation of funds); *Staub v. City of Baxley*, 355 U.S. 313 (1958)(striking down on First Amendment grounds law requiring permit to solicit citizens for membership in any organization that requires fees or dues); *In re Asbestos Litigation*, 46 F.3d 1284, 1290 (3d Cir. 1994)(contributions to political organization are constitutionally protected absent specific intent to further the group's illegal ends).

<sup>17</sup> *See United States v. Robel*, 389 U.S. 258, 262 (1967)(invalidating ban on Communist Party members working in defense facilities absent showing of "specific intent"); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967)("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966)(invalidating oath requiring state employees not to join Communist Party because "a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); *Scales v. United States*, 367 U.S. 203, 221-22 (1961)(construing Smith Act, which barred membership in organization advocating violent overthrow of government, to require showing of "specific intent"); *Noto v. United States*, 367 U.S. 290, 299-300 (1961)(First Amendment bars punishment of "one in sympathy with the legitimate aims of [the Communist Party], but not specifically intending to accomplish them by resort to violence").

Rescue or the NAACP, but the fact that some members of a group may engage in criminal acts does not justify punishing those who have supported those groups *without* intending to further their illegal ends. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 925 (1982).

Third, defendants' proposal that an exception be crafted for "foreign terrorist organizations" whose interests are at odds with those of the United States invites the Court to authorize viewpoint-based discrimination, which is presumptively unconstitutional. See *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-32 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

Fourth, defendants' proposed exception cannot be squared with the fact that the "specific intent" standard was developed in response to government efforts to penalize association with the Communist Party. This Court acknowledged that the Communist Party was a foreign-dominated group dedicated to overthrow the United States government,<sup>18</sup> but held that the *only* narrowly tailored way to further the government's interest in national security was to penalize only those who specifically intended to further its unlawful ends. "A law which applies without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms" and relies on "'guilt by association,' which has no place here." *Elfbrandt v. Russell*, 384 U.S. at 19 (internal citations omitted). If the specific intent standard was

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<sup>18</sup> Congress had made specific findings that the Communist Party was: (1) foreign-dominated; (2) engaged in terrorism and sabotage with intent forcibly to overthrow the United States government; and (3) posed a clear and present danger to our national security. 50 U.S.C. §781 (West 1991)(repealed 1993).

adequate to respond to the threat of the Communist Party, it is likewise sufficient for the PFLP.<sup>19</sup>

Finally, no different result is mandated by the fact that plaintiffs are permanent resident aliens.<sup>20</sup> The First Amendment does not "acknowledge[] any distinction between citizens and resident aliens." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953)(quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945)(Murphy, J., concurring)); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)("resident aliens have First Amendment rights"). In *Bridges v. Wixon*, 326 U.S. at 148, the Court reversed a deportation order based on association with the Communist Party, stating that "freedom of speech . . . is accorded aliens residing in this country." And, in *Harisiades v. Shaughnessy*, 342 U.S. 580, 592 (1952), the Court upheld

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<sup>19</sup> Defendants contend that because the government is permitted to place economic embargoes on transactions with or travel to foreign countries, it should also be permitted to target *political groups* for such treatment. But this Court has said precisely the opposite. In the very cases that uphold country-based limits, the Court has distinguished similar limits placed on the Communist Party, which it has declared unconstitutional. See e.g., *Regan v. Wald*, 468 U.S. 222, 241 (1984)(upholding restriction on travel to Cuba, and distinguishing *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958), both of which invalidated restrictions on travel of Communist Party members). A law directed at trade with a foreign nation may have an *incidental* effect on First Amendment activities, as do many laws. But government action targeted at political association as such *directly* punishes the exercise of a First Amendment right.

<sup>20</sup> The government's petition presents only the question of lawful permanent resident aliens' rights, because the government does not challenge the lower courts' holdings that it failed to identify any "changed circumstances" justifying alteration of the pre-existing preliminary injunction against the other six aliens, who were not permanent residents.

the deportation of a Communist Party member only after finding that the government's evidence satisfied the then-prevailing standard for citizens, set forth in *Dennis v. United States*, 341 U.S. 494 (1951). In doing so, the Court declined to adopt the government's argument that the First Amendment "do[es] not apply to the political decision of Congress to expel a class of aliens whom it deems undesirable residents." *Harisiades*, 342 U.S. 580, 96 L.Ed. at 592-94 (quoting Brief for the United States at 95-96).<sup>21</sup>

The court of appeals did not hold, as the government suggests, that "the constitutional principles applicable to citizens must apply in their entirety to the determination of which aliens will be deported." Pet. 27. Unlike the government in its petition, the court of appeals carefully distinguished the First Amendment from other constitutional provisions. Pet. App. 115a-116a. To hold that permanent residents may be singled out on the basis of viewpoint for First Amendment activities fully protected for United States

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<sup>21</sup> As lower courts have recognized, "[i]t has long been settled that aliens within the United States enjoy the protection of the First Amendment." *Rafeedie v. INS*, 795 F.Supp. 13, 22 (D.D.C. 1992); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 365 (9th Cir. 1995) ("the speech protections of the First Amendment at a minimum apply to all persons legally within our borders"); *Parcham v. INS*, 769 F.2d 1001, 1004 (4th Cir. 1985); *In re Weitzman*, 426 F.2d 439, 449 (8th Cir. 1970) (Blackmun, J.).

Defendants' reliance on *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963), Pet. 28, is misplaced. Because the Court in that case ruled that the INS failed to meet the statutory showing required to establish deportability for Communist Party membership, it had no occasion to address any constitutional claim. The Court has not addressed the constitutionality of deportation for political association since *Harisiades*, where it applied the same First Amendment standard that applied to citizens.

citizens would undermine the speech rights of us all, because the marketplace of ideas rests on communications with and among non-citizens and citizens alike. On the government's view, Peter Jennings, a Canadian citizen and permanent resident alien, would have less freedom to speak than Dan Rather. There is simply no support in logic or precedent for such a distinction.<sup>22</sup>

The merits question is not properly presented on this record, but even if it were, there would be no basis for granting *certiorari* at this preliminary stage in the absence of any conflict among the circuits.

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<sup>22</sup> Even if permanent resident aliens were somehow entitled to diminished First Amendment protection, the actions the government seeks to defend here would be invalid, because they are classic examples of viewpoint discrimination. Plaintiffs were singled out because of their political association with an organization whose political objectives our government disapproves. Even a reduced level of First Amendment protection would prohibit viewpoint discrimination, since it is the paradigmatic First Amendment violation. *R.A.V.*, 505 U.S. at 391.

## CONCLUSION

For all the foregoing reasons, the Court should deny the petition for *certiorari*.

Respectfully submitted,

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Dated: April 30, 1998